NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5640-11T4

THOMAS GRIEPENBURG and
CAROL GRIEPENBURG,

Plaintiffs-Appellants,

v.

TOWNSHIP OF OCEAN, STATE OF
NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION AND
STATE OF NEW JERSEY DEPARTMENT
OF COMMUNITY AFFAIRS,

Defendants-Respondents.

Argued May 21, 2013 – Decided August 29, 2013

Before Judges Fisher, Alvarez and St. John.

On appeal from Superior Court of New Jersey, Law Division, Ocean County, Docket No. L–1420-07.

Peter H. Wegener argued the cause for appellants (Bathgate, Wegener & Wolf, attorneys; Mr. Wegener, of counsel and on the briefs; Rui O. Santos, on the brief).

Gregory P. McGuckin argued the cause for respondent Township of Ocean (Dasti, Murphy, McGuckin, Ulaky, Cherkos & Connors, attorneys; Mr. McGuckin, of counsel; Christopher J. Dasti, on the brief).

PER CURIAM

Plaintiffs Thomas and Carol Griepenburg are the owners of approximately 31 acres of land (the subject property) in the Township of Ocean. Plaintiffs challenged the enactment of Township ordinances that rezoned the subject property from residential (R-2) and highway commercial (C-3) to an EC Environmental Conservation District (EC Zone). We conclude that these ordinances are invalid as applied to plaintiffs' property because the downzoning is not required to serve the stated purposes of the ordinances and does not reflect reasonable consideration of existing development in the areas where the subject property is located. Following our review of the record and the arguments advanced on appeal, we reverse.

I.

The record discloses the following facts and procedural history.

In February 2007, Advanced Horizons IV, LLC, filed a complaint in lieu of prerogative writ under Docket No. OCN-L-773-07 challenging the rezoning of its property as an EC Zone. In April 2007, plaintiffs filed an identical complaint in lieu of prerogative writs under Docket No. OCN-L-1420-07.

Horizons' property consisted of approximately twenty-six acres and was located directly across County Route 532 from the

subject property. Like the subject property, Horizons' property was rezoned EC. Horizons' property was undeveloped except for a telecommunications cell tower. Subsequent to the initiation of litigation, Ocean purchased Horizons' property for the public purpose of preservation of open space and Horizon's suit was dismissed.

The subject property consists of approximately thirty-one acres. The property is contiguous and is located on the south side of County Route 532 and directly east of the Garden State Parkway. Except for plaintiffs' residence covering approximately two acres in the eastern-most section of the subject property, the majority of the property is undeveloped woodland. The subject property does not contain any environmentally distinct features such as wetlands, floodplains, steep slopes, or open waters. There are no threatened or endangered species located on the subject property and no past sightings have occurred.

Prior to rezoning in 2006, the subject property was located in two different zones, C-3 Commercial and R-2 Residential. The R-2 Residential Zone allowed residential development on minimum two-acre lots. The C-3 Commercial zone permitted various types of commercial development on minimum one-acre lots in order to accommodate an interchange which bisected the Garden State

Parkway and Country Road 532. The desired commercial uses included retail space, offices, medical facilities, and hotels. Prior to rezoning, plaintiffs had entertained offers to sell their property for use as a hotel site.

Beginning in 2004, Ocean became interested in concentrating development in a town center and slowing development outside the center. The Planning Board recommended rezoning Ocean's industrial zoning districts located west of the Garden State Parkway, as well as some properties located east of the Garden State Parkway, to an environmentally sensitive land use designation. This area included the subject property.

Ocean requested from the State Planning Commission, changes to the planning area boundaries in the State Development & Redevelopment Plan (State Plan). The State Plan is the product of the State Planning Act, N.J.S.A. 52:18A-196 to -207. The Act charges the State Planning Commission with the task of adopting and revising a State Plan providing for a "coordinated, integrated and comprehensive plan for the growth, development, renewal and conservation of the State and its regions and which shall identify areas for growth, agriculture, open space conservation and other appropriate designations." N.J.S.A. 52:18A-199(a). The Plan generally divides the State into five planning areas: PA-1 (metropolitan or urban); PA-2 (developed

suburban); PA-3 (fringe suburban); PA-4 (rural); and PA-5 (environmentally sensitive). The subject property had been within PA-2 but following Ocean's request the PA-5 designation area was expanded in the Township to encompass the subject property. The State Plan does not provide for a minimum acreage requirement for parcels within PA-5.

On September 21, 2006, Ocean adopted Ordinance 2006-34[1] (ordinance) which established the boundaries, design regulations, and standards for a new EC Zone. The ordinance stated: "It is the intent of this area to act as the low density environs of the center. Given the environmentally sensitive characteristics for the area, only very low intensity uses are allowed. Protection of the area is the principle objective of the EC district." Additionally, Ocean's expert professional planner Stan Slachetka testified that aside from protecting the environmentally sensitive nature of the land, Ordinance 2006-34's purpose was "to create a very, very distinct and clear boundary between" the town center and lands within environmentally sensitive areas.

After rezoning by Ocean, the subject property was included within the EC Zone. The EC Zone allows for development of one

[1] Ocean later adopted Ordinance 2006-37 and Ordinance 2006-39, which made minor amendments to Ordinance 2006-34.

unit per twenty acres. Plaintiffs' single-family residence is located on the subject property, and since the EC Zone only allows one unit per twenty acres, plaintiffs are unable to further develop their thirty-one acres.

The land surrounding the subject property consists mostly of residential lots. To the south of the property is residential development consisting of single family homes on individual lots, including an eighteen acre property that is developed with seven lots. The seven lot property contains wetlands and a cranberry bog. Further south of these residential lots is a 1400 unit residential development on 292.76 acres owned by U.S. Homes.

To the east of the subject property are residential lots consisting of single family homes. These properties range in size from .23 acres to approximately two acres and were also included within the EC Zone. The property acquired by Ocean from Horizon was located north, across County Road 532 from the subject property. Also north of the subject property are undeveloped lots and a cemetery. Immediately west of the subject property is the Garden State Parkway. Land on the other side of the Parkway is under the jurisdiction of the Pinelands Commission.

The plaintiffs' claims were bifurcated and their claim contesting the validity and reasonableness of Ocean's ordinances proceeded to a four-day bench trial. On August 31, 2011, the trial judge rendered a written decision awarding judgment to Ocean and dismissing the plaintiffs' action in its entirety. The trial judge determined:

> that Ocean Township undertook a deliberative and comprehensive planning effort that spanned several years to achieve its desired Master Plan. The Process embraced smart growth and planning from a local and regional approach at all levels of government. Ordinance 2006-34 was designed to provide the "foundation for implementation of the Township's proposed Waretown Town Center as well as proposed land use goals, environmental goals, housing needs, open space goals, circulation, parking, design, economic development and utility infrastructure goals." As a result, Chapter 18 was amended to include new Chapter 18-21 entitled "EC Environmental Conservation District" which limited development in that district to one residential dwelling for every 20 acres. Section 18.21.010 indicated that the EC District corresponded to those environmentally sensitive areas outside of the west of the EC District and the Waretown Town Center, as well as east of the Garden State parkway. The intent of the EC District was to provide the low density environs of the Center and permit only very low density residential development for the protection and conservation of natural resources as a principle objective. The court finds that the restrictions placed on the Griepenburg property are reasonably related and calculated to achieve the purposes of the challenged zoning ordinances. The

> presumption of validity to these ordinances has not been overcome by the evidence in this record, and the Township's actions are not found to be arbitrary, capricious or unreasonable. Moreover, the challenged ordinances as applied do not deny all practical beneficial use of the property. Gardner v. N.J. Pinelands Com'n., 125 N.J. 193 (1991). The Griepenburg tract of approximately 30 acres is currently developed with a single-family residence which is in conformance with the zoning requirements.

An accompanying order was entered on September 20, 2011.

On November 10, 2011, the trial judge entered a consent order reinstating plaintiffs' inverse condemnation claim. Ocean moved for summary judgment on that claim and plaintiffs filed a cross-motion for summary judgment. Oral arguments were held after which the trial judge granted Ocean's motion for summary judgment determining that plaintiffs had not exhausted their administrative remedies, therefore, plaintiffs' inverse condemnation claim was not ripe for adjudication. An accompanying order was entered on June 6, 2012. It is from these two decisions that plaintiffs appeal.

II.

A trial court will grant summary judgment to the moving party "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact

challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c); see also Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c).

"On appeal from an order granting summary judgment, we apply the same standard that governs the analysis by the motion judge." Atl. Mut. Ins. Co. v. Hillside Bottling Co., 387 N.J. Super. 224, 230 (App. Div.) (citing Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998)), certif. denied, 189 N.J. 104 (2006). "We therefore must first determine whether, giving the non-moving party the benefit of all reasonable inferences, the movant has demonstrated that there are no genuine issues of material fact." Id. at 230-31 (citing Brill, supra, 142 N.J. at 540). We next analyze whether the motion judge's application of the law was correct. Id. at 231; see also Prudential, supra, 307 N.J. Super. at 167. In carrying out our review, however, we owe no deference to the interpretation of the motion judge on

matters of law. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

In an appeal from a bench trial, "[t]he scope of appellate review of a trial court's fact-finding function is limited." Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011) (quoting Cesare v. Cesare, 154 N.J. 394, 411 (1998)) (internal quotation marks omitted). "[W]e do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant[,] and reasonably credible evidence as to offend the interests of justice." Ibid. (quoting In re Trust Created By Agreement Dated Dec. 20, 1961, 194 N.J. 276, 284 (2008)) (internal quotation marks omitted). "Deference is especially appropriate when the evidence is largely testimonial and involves questions of credibility." Ibid. (quoting Cesare, supra, 154 N.J. at 412). "Because a trial court hears the case, sees and observes the witnesses, and hears them testify, it has a better perspective than a reviewing court in evaluating the veracity of witnesses." Ibid. (quoting Cesare, supra, 154 N.J. at 412). However, we owe no deference to a trial court's interpretation of the law, and review issues of law de novo. State v. Parker, 212 N.J. 269, 278 (2012); Mountain Hill, L.L.C. v. Twp. Comm. of Middletown, 403 N.J.

Super. 146, 193 (App. Div. 2008), certif. denied, 199 N.J. 129 (2009).

Zoning ordinances enjoy a presumption of validity. Rumson Estates, Inc. v. Mayor and Council of Fair Haven, 177 N.J. 338, 350 (2003). A party attacking the ordinance bears the burden of overcoming the presumption. Ibid. A plaintiff may overcome this strong presumption of validity by showing that an ordinance, "'in whole or in application to any particular property' is 'clearly arbitrary, capricious or unreasonable, or plainly contrary to fundamental principles of zoning or the [zoning] statute.'" Pheasant Bridge Corp. v. Twp. of Warren, 169 N.J. 282, 289-90 (2001) (citations omitted), cert. denied, 535 U.S. 1077, 122 S. Ct. 1959, 152 L. Ed. 2d 1020 (2002). In evaluating this issue, we do not pass on the wisdom of the ordinance, but rather "engage[] in a review of the relationship between the means and ends of the ordinance." Id. at 290 (citations omitted). As the Supreme Court has noted:

> the means selected must have real and substantial relation to the object sought to be attained, and the regulation or proscription must be reasonably calculated to meet the evil and not exceed the public need or substantially affect uses which do not partake of the offensive character of those which cause the problem sought to be ameliorated.

> [Ibid. (quoting Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 251 (1971)).]

Here, the trial judge relied on our decision in In re Adoption of N.J.A.C. 7:15-5.24(b) & N.J.A.C. 7:15-5.25(e), 420 N.J. Super. 552 (App. Div.), certif. denied, 208 N.J. 597 (2011), to support his opinion that environmentally sensitive areas include areas which would be expected habitats for threatened or endangered species. In In re Adoption of N.J.A.C. 7:15-5.24(b), supra, 420 N.J. Super. at 568, we cited N.J.S.A. 13:9B-7(a)(2) of the Freshwater Wetlands Protection Act (FWPA), N.J.S.A. 13:9B-1 to -30, which described wetlands of exceptional resource value as wetlands

> which are present habitats for threatened or endangered species, or those which are documented habitats for threatened or endangered species which remain suitable for breeding, resting, or feeding by these species during the normal period these species would use the habitat. A habitat shall be considered a documented habitat if the [DEP] makes a finding that the habitat remains suitable for use by the specific documented threatened and endangered species, based upon information available to it, including but not limited to, information submitted by an applicant for a freshwater wetlands permit.

However, N.J.S.A. 13:9B-7 creates a system for the classification of freshwater wetlands based upon criteria which distinguish among wetlands of exceptional resource value,

intermediate resource value, and ordinary resource value when an applicant applies for a freshwater wetlands permit. The FWPA does not regulate property such as the subject property which does not contain any freshwater wetlands.[2] Therefore, we disagree with the trial judge that the FWPA supports the conclusion that the subject property is an environmentally sensitive area.

However, this does not end our inquiry given that ordinances enjoy a presumption of validity. Our focus must be on whether the ordinance as applied to the subject property is arbitrary and capricious. The basis of the ordinance is that because of "the environmentally sensitive characteristics for the area, only very low intensity uses are allowed."

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[2] N.J.S.A. 13:9B-3 defines "freshwater wetland" as:

> an area that is inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions, commonly known as hydrophytic vegetation; provided, however, that the department, in designating a wetland, shall use the 3-parameter approach (i.e. hydrology, soils and vegetation) enumerated in the April 1, 1987 interim-final draft "Wetland Identification and Delineation Manual" developed by the United States Environmental Protection Agency, and any subsequent amendments thereto[.]

"[A]ny land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones is reverse or inverse spot zoning." Riya Finnegan LLC v. Twp. Council of South Brunswick, 197 N.J. 184, 197 (2008) (quotation mark omitted). In striking an offending ordinance, our Supreme Court explained:

> It is not simply that the zoning for plaintiff's parcel was changed, or that it will now be more difficult for the owner to develop it in accordance with the new zoning designation when its proposed site plan was completely in accord with the previously-designated zone. It is not only that the neighboring property owners were the impetus for the change, or that the new zone was originally designed for an entirely different part of the town and for different planning purposes or that the new zone does not further a comprehensive plan. It is not merely that the planning board or the municipality's governing body acted without hearing from expert planners or consultants that makes this ordinance defective. Rather, it is the combination of those facts that marks this decision as an example of inverse spot zoning and makes the choice of the governing body both arbitrary and capricious.
>
> [Ibid.]

The Court added: "The emphasis, of course, is on the arbitrary nature of the decision rather than simply upon whether a particular parcel has received beneficial or detrimental treatment." Ibid.

Ocean maintains that since the ordinance is consistent with PA-5 under the State Plan, that its designation of the subject property as EC Zone was not arbitrary and capricious. However, in Mount Olive Complex v. Township of Mount Olive, 340 N.J. Super. 511, 541 (App. Div. 2001) (citing N.J.A.C. 17:32-6.1(b)) remanded on other grounds, 174 N.J. 359 (2002), we noted that the State "[P]lan is not intended to validate or invalidate any municipal code or zoning ordinance." Thus Ocean cannot rely on the designation of the subject property as PA-5 under the State Plan to validate its downzoning of the property.[3]

In light of existing development in the areas surrounding the subject property, we conclude that Ocean has not shown that the limitation of development to one unit per twenty acres is required to serve the stated purposes of the zoning ordinances. In view of the nearby residential development and the absence of any significant environmental constraints upon development, the limitation of potential future residential development of the subject property to one unit per twenty acres is arbitrary and unreasonable.

[3] Plaintiffs' action originally included the New Jersey Department of Environmental Protection and the State of New Jersey Department of Community Affairs but those parties were later dismissed without prejudice.

Moreover, we believe our decision in Bailes v. Township of East Brunswick, 380 N.J. Super. 336, 365-58, certif. denied, 158 N.J. 596 (2005) to be instructive here. In Bailes, the plaintiffs challenged the validity of zoning ordinances that downzoned the permitted densities of their properties from one unit per acre or one unit per two acres to one unit per six acres, with cluster options ranging from one unit per three acres to one unit per three-and-one-half acres. We held that given the existing development of property within the township, the challenged ordinances were unreasonable and arbitrary, and not justified by any environmental need.

In this case, the subject property has been rezoned from one unit per one acre or one unit per two acres, to one unit per twenty acres. Undoubtedly, the downzoning of the subject property in this case is even more severe than in Bailes. Moreover, in Bailes unlike here, the township permitted cluster options, yet nevertheless we determined that the downzoning which resulted from the ordinances "place[d] an unfair burden upon plaintiffs and [was] not reasonably calculated to serve any legitimate zoning purpose." Id. at 460. It is clear to us that the downzoning of the subject property unduly burdens plaintiffs given that there are no environmentally sensitive characteristics to the subject property.

While the rezoning of the subject property for lower density development will result in preservation of a greater amount of open space, Ocean may not compel private property to be devoted to preservation for open space by restrictive zoning that is not justified by environmental constraints or other legitimate reasons. See Pheasant Bridge, supra, 169 N.J. at 294-95. Instead, Ocean must acquire any properties that it deems necessary for open space preservation by payment of fair market value to the owners. See Mount Laurel Twp. v. Mipro Homes, L.L.C., 379 N.J. Super. 358, 371-74 (App. Div. 2005), aff'd, 188 N.J. 531 (2006), cert. denied, 552 U.S. 940, 128 S. Ct. 46, 169 L. Ed. 2d 242 (2007).

Given our determination that the ordinance is invalid as applied to the subject property, we need not address plaintiffs' contention that Ocean's actions amounted to inverse condemnation.

Accordingly, the judgment of the trial court is reversed and the case is remanded for entry of judgment declaring the zoning of the EC Zone to be invalid as applied to plaintiffs' subject property and reinstating the zoning that applied to the subject property before the adoption of the ordinance.